Supreme Court, U.S.
FILED
061599 MAY 29 2007
OFFICE OF THE CLERK

NO. _____

IN THE

Supreme Court of the United States

MICHAEL JESUS COY,
Petitioner

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari
to the Seventh Court of Appeals
At Amarillo, Texas

PETITION FOR A WRIT OF CERTIORARI

Michael J. Coy
Petitioner
907 Victoria Ridge Dr.
Pflugerville, TX 78660
(512) 632-0026
(512) 670-1032
Petitioner – Pro Se

QUESTIONS PRESENTED

I. Whether a defendant's Sixth Amendment right to confront the witness was abridged when the Texas Court of Appeals, Seventh District in affirming the Texas State trial court, concluded that Crawford v. Washington, 541 U.S. 36 (2004), did not apply to preclude the admission of hearsay testimony although defendant's attorney timely and specifically objected to the admission of hearsay testimony?

II. Whether the failure of a defendant's attorney to specifically use the words "Confrontational Clause" in the objection made at trial abridged the rights of a defendant to confront the witness against him since according to U.S. v. Cromer, 389 F.3d 662 (6th Cir. 2004) the failure to use the words "Confrontation Clause" constitutes "plain error" and thereby deprived defendant of effective counsel, prejudiced the defense, and denied defendant a fair trial according to Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 126 S.Ct. 2266 (2006)?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PETITION FOR A WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION..... 1

CONSTITUTIONAL PROVISION INVOLVED.....2

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....13, 17

CONCLUSION.....19

Appendix A: Opinion of the Texas Court of Appeals, Seventh District .....App. A1

Appendix B: Texas Court of Criminal Appeals Refusal Letter.....App. A6

Appendix C: Excepts of Trial Transcript.....App. A7

Appendix D: Jury Wavier.....App. A40

Appendix E: Excerpts Texas Rules of Appellate Procedure Rule 33.....App. A42

Appendix F: First Subpeona of Complainant.....App. A44

Appendix G: State's Motion for Continuance....App. A46

Appendix H: Second Subpeona of Complainant..App. A48

Appendix I: State's Brief to the Texas Court of Appeals, Seventh District.....App. A50

TABLE OF AUTHORITIES

CASES:

California v. Green, 399 U.S. 149 (1970).....13

Coy v. Iowa, 487 U.S. 1012 (1988).....4

Coy v. State, August 15, 2006
(Unpublished).....5, 7, 17, 18

Crawford v. Washington, 541 U.S. 36
(2004).....passim

Davis v. Washington, 126 S.Ct. 2266
(2006).....passim

Douglas v. Alabama, 380 U.S. 415, (1965)..... 3

Hammon v. State, 809 N.E.2d 945
(Ind.Ct.App. 2004).....3, 4, 5, 15

Hammon v. State, 829 N.E.2d 444
(Ind. S. C. 2005)..... 3, 4, 5, 15

Johnson v. United States, 520 U.S. 461
(1997).....18

Maryland v. Craig, 497 U.S. 836 (1990).....12

Mattox v. U.S., 156 U.S. 237 (1895) 13

Pointer v. Texas, 380 U.S. 400 (1965).....12

Strickland v. Washington, 466 U.S. 668
(1984).....6, 17

United States v. Cromer, 389 F.3d. 662 (6th Cir. 2004).....6, 18

United States v. Jones, 108 F.3d 668 (6th Cir. 1997).....18

United States v. Koeberlein, 161 F.3d 946 (6th Cir.1998).....18

United States v. Olano, 507 U.S. 725 1993).....18

White v. Illinois, 542 U.S. 346 (1992).....4

Federal Constitutional Provisions and Federal/State Statutes:

28 U.S.C. § 1257(a).....1

U.S. Const. Amend. VI and XIV "Confrontational Clause" and "Due Process".....passim

Fed.R.Evid. P.52(b).....18

Texas Rules of Appellant Procedure 33.1(a)(1)(A).....11, 15

Texas Rules of Evidence 803(2).....1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael J. Coy respectfully petitions the United States Supreme Court for a writ of certiorari to review the judgment of Court of Appeals, Seventh District at Amarillo, Texas, in this case.

OPINIONS BELOW

The opinion of the court of appeals [Appendix (App.) *infra*, A1 – A5] is unpublished (Not Reported in S.W.3d, 2006 WL 2361202 (Tex. App.-Amarillo)). The Texas Court of Criminal Appeals unpublished order refusing motion for rehearing of Petition for Discretionary Review (PDR) is reprinted at App., *infra*, A6.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals, Seventh District was entered on August 15, 2006. (See App., *infra*, pages A1- A5). The judgment was based on the allowance of hearsay testimony permitted by Texas State law rule 803: Hearsay Exceptions: Availability of Declarant Immaterial: (2) Excited Utterance. A statement relating to a starling event or condition made while the declarant was under the stress of excitement caused by the event or condition. The Texas Court of Criminal Appeals refused a motion for rehearing of Petition for Discretionary Review (PDR) on February 28th, 2007. *Id.* at A6. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a) which states that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where... the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States..."

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witness against him ... and to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI.

STATEMENT OF THE CASE

CONFRONTATIONAL CLAUSE

The material facts related to this case follow. On June 13th, 2005 the petitioner was arrested and charged with assaulting his wife during a verbal dispute at petitioner's house. Petitioner's wife made allegations to the police that petitioner assaulted her, but she refused to appear at trial despite numerous subpoenas (See App. pages A44-A45 and A48-A49). As a result, petitioner's wife did not provide testimonial evidence to support her claims, and petitioner, through his attorney, was denied the right to cross-examine or otherwise confront his wife (the witness) who was thereby unavailable (see page 7 below and App. pages A2, A7, and A8 "**Appearances**" section). Petitioner had no prior opportunity to cross-examine the witness. (See page 7 below and App. pages A7 and A36). During the trial, the prosecutor offered the hearsay testimony of a non complainant (the police) to support the claim that petitioner assaulted his wife. In response, petitioner's attorney raised a hearsay objection to the admission of the non complainant's hearsay testimony and did so repeatedly. The petitioner's attorney did not state the words "Confrontational Clause" violation in connection with the hearsay objection, however, the prosecutor and judge in the State trial court understood that the Confrontational Clause was in question. Specifically,

the prosecutor's response to the objection was to argue that Crawford v. Washington applied to the "excited utterance" exception of the hearsay rule and thus allows the admission of hearsay testimonial evidence of the non complainant. (See page 8 below and App. pages A2, A9 and A10). The State trial court allowed the admission of the hearsay testimony. Petitioner was thereby deprived of his right to confront the witness and was convicted of an assault with bodily injury. Petitioner filed an appeal to the Court of Appeals, Seventh District. The Court of Appeals affirmed the trial courts finding. The petitioner then filed a Petition for Discretionary Review (PDR) with the Texas Court of Criminal Appeals, Texas' highest court, and was denied discretionary review on February 28, 2007.

In many cases, hearsay testimony is admitted by State courts in accordance with the State's hearsay exception rule. However, State courts admit such testimony despite defendant's attorney who amply and timely objects (Douglas v. Alabama, 380 U.S. 415, 421-23 (1965) to the admission and continues to object that the testimony is inadmissible but does not explicitly mention "Confrontational Clause" violation in connection with the hearsay objection. The petitioner herein believes this Court should resolve the conflict wherein State court decisions contradict Federal judicial decisions on a question of Constitutional law such as applies here. In particular, where the petitioner's attorney specifically objected to hearsay statements by a non-complainant in trial and the prosecutor made erroneous statements in the State trial court that the case, Crawford v. Washington, allows admission of hearsay statements based on an exception--such as in this case, excited utterance--against the defendant in trial despite the fact that admitting such statements would violate the defendant's Sixth Amendment rights. However, in Hammon v. State (809 N.E.2d 945 (Ind. Ct. App. 2004) and 829 N.E.2d 444 (Ind. S.

C. 2005), the defendant's attorney did not invoke the "Confrontation Clause" by name, but he made a continuing objection on grounds of hearsay to her statements and the Indiana court of appeals and supreme court in Hammon concluded this was sufficient to preserve the hearsay objection on the grounds that hearsay statement violates the Confrontation Clause. Further, prior to Crawford v. Washington (2004), if a hearsay statement fell within the excited utterance exception to the hearsay rule, this would give rise to an objection based on the Confrontation Clause (White v. Illinios, 542 U.S. 346 (1992)). In any event, both the court of appeals and the supreme court in Hammon v. State, 809 N.E.2d 945 (Ind.Ct.App. 2004) and 829 N.E.2d 444 (Ind.S.C 2005) treated the Confrontation Clause objection as being preserved and reached the merits of it.

This case presents an issue where the rights of the accused under the sixth amendment (Confrontation Clause) "to be confronted with the witnesses against him" was traditionally understood to "guarantee[] the defendant a face-to-face meeting with the witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016 (1988). In addition, since this Court's transformative decision in Crawford v. Washington, 541 U.S. 36 (2004), some courts have recognized that admitting hearsay evidence is improper, because it would effectively allow a prosecution witness to testify at the scene of the crime, without subjecting herself to the procedures --most notably cross-examination-- that the Constitution affords the accused. Specifically, Crawford v. Washington, 541 U.S. 61, 68 (2005) states "where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence...The Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."

The trial court record herein (See App pages A9, A10, and A12) shows that the objection to hearsay by the

petitioner's attorney and the statements made by the prosecutor to the court after the petitioner's attorney objection was a violation of his rights to face his accuser. The prosecutor also stated in the record during closing statements that "the victim obviously isn't here today" (See App. page A18). The trial court specifically was aware that the objection to hearsay of the two police officers' hearsay testimony at trial abridged the petitioner's Sixth Amendment rights under the United States Constitution as it pertains to Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 126 S. Ct. 2266 (2006). The Texas Court of Appeals, Seventh District ruling in Coy v. State (See App. pages A1 - A5) is inconsistent with the Hammon v. State (809 N.E.2d 945 (Ind.Ct.App. 2004) and 829 N.E.2d 444 (Ind.S.C. 2005) rulings and the U.S. v. Cromer (389 F.3d 662 (6th Cir. 2004) ruling because in those cases the defendant or the attorney did not explicitly use the word "Confrontational Clause" in their objection and those appeal courts reached decisions that concluded the hearsay objection was sufficient to raise the "Confrontation Clause" despite the fact that defendant's counsel or a defendant did not specifically use the words "Confrontation Clause" in objecting to hearsay.

Furthermore, the record herein shows that at no time did the petitioner waive his right to be confronted against his accuser. In fact, the petitioner signed a document in trial that only waived his right to trial by jury (See App. pages A8, A40, and A41) although the document also provides that a defendant does not waive his or her Sixth Amendment rights to Confrontation.. According to the Hammon v. State ruling (citing the Crawford v. Washington, 542 U.S. 36 (2004)), the Supreme Court held that when a prosecution seeks to introduce a "testimonial" out-of-court statement into evidence against a criminal defendant, the Confrontation Clause of the Sixth Amendment requires two showings: (1) that the witness who made the statement is unavailable; and (2) that the defendant had a prior opportunity to cross-

examine the witness. In the instance case, the State provided information in the record to show the witness was unavailable (See App. pages A7 and A8 "Appearance" section), but did not provide information in the record as to whether the Petitioner had prior opportunity to cross-examine the witness as required under Crawford v. Washington, 541 U.S. 36 (2004). Also, after this case was fully briefed, but before the decision was handed down, Davis v. Washington, 126 S. Ct. 2266, 2273-2274 (2006) ruled that hearsay testimonial evidence if admitted is a violation of a defendant's Sixth Amendment to the U.S. Constitution when circumstances objectively indicate that there is no on-going emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. In the instant case, the record shows that there was no on-going emergency (See App. page A16). Therefore, based on the trial court record, it should have been clear to the Court of Appeals, Seventh District and the Texas Court of Criminal Appeals that the Petitioner's basic constitutional rights were violated under the U.S. Constitution Sixth Amendment right to confrontation of witnesses and assistance of counsel were violated.

Furthermore, petitioner believes that failure of his attorney to use the specific words "Confrontation Clause" in connection with a hearsay objection amounts to a denial of competent counsel for petitioner. In U.S. v. Cromer, 389 U.S. F.3d 662 (6th Cir. 2004) this is regarded as a "plain error" and resulted in the violation of defendant's Sixth Amendment rights to cross-examination and confrontation. As with Cromer (2004) the failure of defendant's attorney or defendant to use the specific words "Confrontation Clause" is "plain error" and resulted in the violation of petitioner's Sixth Amendment right to cross-examination and confrontation, prejudiced petitioner's defense, and deprived him of a fair trial. Similar to Strickland v. Washington, 466 U.S. 668 (1984), the error was a substantial and material error that

denied the petitioner a fair trial.

AT TRIAL PROCEEDINGS

In trial court, the wife failed to appear for trial (See App. pages A7 & A8 "**Appearances**" section, and A18) although she had been served with two subpoenas (See App pages A44-A45 and A48-A49) and the trial court permitted the State, over objection of Petitioner's counsel, to introduce statements she allegedly made to the police even though the memory of a police officer was questionable (See App. pages A9, A14-15, A34, & A35). Petitioner was convicted of assault by bodily injury and sentenced to one year confinement and a $4,000 fine, probated in favor of one year community supervision.

As stated above, two subpoenas (See App. pages A44-A45 and A48-A49) were executed by the State, one on September 22, 2005 and the second on November 7, 2005, to compel the Complainant's attendance at trial. (See App. pages A44-A45, A48-A49 and A46-A47) When the Complainant did not appear on October 4, 2005, the State moved for a continuance to compel her appearance. (See App pages A46-A47) Subsequently, on November 14, 2005, when the Complainant failed to appear in response to the second subpoena, the State proceeded to trial without the witness. Although the witness was unavailable for trial, the trial court record did not reflect any discussion of the fact that witness was not available.

The State attempted to admit the out-of-court hearsay statements of the Complainant through the testimony of the two officers who investigated the complaint and interviewed the Complainant, as part of their investigation (See App. pages A9, A11, and A12). Petitioner's counsel objected that the evidence was hearsay and, therefore, inadmissible (See App. page A9). Prosecution (Ms. Beckage) asked the first officer who testified:

Ms. Beckage: Q. What did she say happened? (See App. page A9)
Petitioner's counsel then said:

Mr. Carrillo: Objection, hearsay Your Honor. (See App. page A9)

The State argued that the statements should be admitted under the "excited utterance" exception (See App. page A9). The State prosecutor then joined and stated:

Ms. Beckage: Judge, at this time the State believes that we have layed (sic) the necessary predicate for an excited utterance under **Crawford**. [T]he officer has testified that the victim in this case was crying, she seemed to be fearful, she was hiding in a closet and that she was under stress of an exciting event. So at this point, Your Honor, I believe that this is no longer hearsay, in fact it's an exception to hearsay at this point (See App. page A9).

During the continuing argument over the objection, The State raised Crawford again and she stated that:

Ms. Beckage: My understanding Judge is that an excited utterance like hey or you. An excited utterance can be a series of things said it just depends what amount the declarant is still dominated by emotions, excitement, fear, or pain. And clearly this woman being in a closet was in fear of something, and under **Crawford** those types of things crying, fear, stress, intimidation, are all predicates along with non-testimonial. This officer testified that basically he said what's going on because he probably had to determine what happened, how to deal with the situation (See App. page A9 and A10).

The trial court ruled that the hearsay exception of excited utterance applied in spite of the Crawford case. The

Judge stated: State I'm not sure that you cited the right case, the case you cited I don't recall the term excited -well footnote perhaps.....I do believe that the statements I'm about to hear are do fall under the excited utterance and I will allow it....But as to what I heard so far I overrule the objection (See App. page A10).

Therefore, it was clear from the trial court record that the judge specifically knew the objection of hearsay by the defendant's attorney and then joined by the statements from the prosecutor as she mentioned Crawford in her continuing arguments. In fact, the record shows that the judge and the prosecutor were well aware of the specifics of Crawford v. Washington, 541 U.S. 36 (2004) in which the U.S. Supreme Court held that "all testimonial evidence be excluded unless the person who made the statements is unavailable to testify and the defendant had a prior opportunity for cross-examination. In addition, since the prosecutor raised Crawford and the trial judged overruled the objection by the petitioner's attorney, the trial court abridged the rights of the petitioner regarding the Sixth Amendment. Later in trial when the second officer testified, the prosecutor asked the second officer (See App. pages A11 and A12):

Ms. Beckage: Q. And do you recall that she said anything regarding what had happened?

The second officer stated (See App. page A12):

Mr. Hawkins: A. Yes. After I spoke to Officer Warren I approached her also to find out.

The petitioner's attorney then objected again to the hearsay testimony by the second officer (See App. page A12).

The statements made by the police officers, that were allowed to be admitted by the State trial court judge over the objections of the petitioner's attorney, abridged the

petitioner's Constitutional rights under the Sixth Amendment, the right to confront his accuser. The State's assertion that petitioner was physically abusive was wholly based on the hearsay testimony of the police officers and was not supported by other testimonial evidence presented in this case. For example, petitioner testified that he did not assault the witness and he directly testified that the witness had been arguing all weekend long with him to dissuade him from allowing his son to come home for a scheduled visit (See App. pages A21, and A22). Petitioner also testified that the witness became physically aggressive and threatened to call the police prior to the alleged assault with the petitioner (See App. pages A21 & A22). The police officer testified that the Complainant (witness) claimed petitioner was yelling and waving his arms both the night before and the morning of June 13, 2005 (See App. page A10). However, the petitioner's son directly testified there was no yelling at anytime (See App. page A29 and A30). Additionally, petitioner's son testified that when he saw the witness that morning, she was not crying or acting scared (See App. page A30). The prosecutor testified that the petitioner's son was "certainly not lying he seems like a good kid" (See App. page A32). Further, the initial call for police intervention was to respond to a verbal disturbance only and such was the officer's testimony in trial court (See App. pages A11, A13 and A14). The police officer testified that upon arriving at the residence, he did not observe any evidence that would indicate there had been a physical altercation, a point which raised doubt about the veracity of the witness' statements in the judge's mind (See App. page A16 and A31-A33).

In this instance, it is uncontroverted that the witness locked herself in the bathroom closet all night, which gave her ample time to reflect on her story (See App. pages A9 and A23-A24). Despite the fact that the witness had her cell phone with her all night long, she did not make an attempt to call anyone until the next morning and during this time was

not in contact or in close proximity with petitioner, indicating no emergency existed (See App. pages A24 - A26). The hearsay evidence by the police officer suggests that the witness' story may have been fabricated before petitioner could have had an opportunity to come into physical proximity of the witness. Essentially the State presented no evidence to support Complainant's allegations of physical abuse against petitioner. In other words, the only testimony of an assault was based on the hearsay (out-of-court) statements of the witness through the police officers.

COURT OF APPEALS PROCEEDINGS

The State argues in its brief to the Court of Appeals that it was the petitioner's counsel strategic motivation not to use the specific words "Confrontational Clause" violation and according to the State is demonstrated by the record. (See App. page A51 "**Argument Two Summary**") In addition, the State argued that petitioner's theory of the events that occurred on June 13th, 2005 were not true, according to the State's brief to the Court of Appeals, Seventh District (See App. pages A50 and A54). The State's argument is superfluous since the only way to test whether the Complainant is telling the truth or fabricating the story to the police officers is to cross-examine her under oath, similar to cross-examination under oath of the petitioner, petitioner's son, and the police officers were cross-examine in court under oath. In other words, the trial judge specifically stated that this case was obviously had a credibility issue (App. A32). Further, the Texas Court of Criminal Appeal's own procedure, Rule 33, states that the error is preserved if the grounds of objection are apparent from the context of the record (See App. page A42). The grounds for the hearsay objection raised by petitioner's attorney during the trial were apparent from the context of the record as evidence by the prosecutor and judge's recorded statements in response to the

objection. Accordingly, the trial court's decision to allow the hearsay testimony to be admitted over the objection of petitioner's attorney, as affirmed by the Texas Court of Appeals, and the Texas Court of Criminal Appeals, which refused to the petitioner's PDR abridged the petitioner's Sixth Amendment right to confrontation.

In a panel opinion, the Court of Appeals stated that objection to hearsay does not preserve error on Confrontation Clause grounds. On the contrary, the error was preserved in trial and the record shows this fact because petitioner's counsel amply and timely objected, the prosecutor mentioned the Crawford case to the court, and the judge concluded that the Crawford case did not apply. Therefore, the trial court was well aware of the constitution error against the petitioner regarding the "Confrontational Clause" issue. The Court of Appeals stated that the objection issue does not present anything for review and is overruled (See App. page A3). Also, the Court of Appeals stated that "Based on the record before us and provided the presumption that trial counsel's conduct falls within the wide range of reasonable and professional representation, no reversible error is demonstrated" (See App. page A5). However, since the petitioner's attorney failed to use the specific word "Confrontational Clause" violation and the first issue presented holds true by this Court, this was a serious and material error that prejudiced the defense and denied the petitioner a fair trial.

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witness against him." The Confrontational Clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. (Pointer v. Texas, 380 U.S. 400, 403-05, 85 S. Ct. 1065 (1965)). The Principle concern of the Confrontation Clause is "to ensure that reliability of the evidence against a criminal defendant by subjecting it to

rigorous testing in the context of an adversary proceeding before the trier of fact." (Maryland v. Craig 497 U.S. 836, 845, 110 S. Ct. 3157 (1990)). A defendant's right to confrontation accomplishes at least three fundamental purposes of our justice system. This right: (1) insures that the witness will give [her] statements under oath-thus impressing [her] with the seriousness of the matter and guarding against the lie by the possibility of a penalty of perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making statement, thus aiding the jury in assessing [her] credibility. (California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930 (1970)). In Mattox v. U.S., 156 U.S. 237 (1895), the primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling [her] to stand face to face with the jury in order that they may look at [her] and judge by [her] demeanor upon the stand and the manner in which [she] gives [her] testimony whether [she] is worthy of belief.

REASONS FOR GRANTING THE WRIT

I. Error was preserved in trial court despite the ruling by the Court of Appeals that error was not preserved and presents nothing for review. Petitioner's Sixth Amendment to the U.S. Constitutional was abridged by the trial court according to Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 126 S. Ct. 2266 (2006).

The record shows that petitioner's attorney timely objected to hearsay evidence during petitioner's trial on three different occasions. First, petitioner's attorney timely objected to hearsay when the first police officer testified to out-of-court testimony (See App. page A9). Second, petitioner's attorney timely objected to the second police officer's testimony as being cumulative to the first officer's testimony (See App. pages A11 and A12). Finally, the trial counsel timely objected to a victim-services counselor's out-of-court testimony as her testimony being cumulative from the previous two witness' testimony (See App. pages A17 and A18). While petitioner's attorney did not state the words "Confrontational Clause" in connection with the hearsay objection, the State's prosecutor and judge understood this to be the grounds for the objection and thus his objection was within the context of the record. In response to the objection, the State prosecutor raised Crawford as the basis to allow the hearsay out-of-court testimony, under the excited utterance exception to the hearsay rule, against the petitioner (See App. page A9). Crawford v. Washington (2004) makes clear that in a criminal prosecution any hearsay permitted under the rules of evidence is also subject to the defendant's right "to be confronted with the witness against him" (Crawford v. Washington, 541 U.S. 36, 38 (2004). The Crawford ruling also held that "all testimonial evidence be excluded unless the person who made the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination" (Crawford v. Washington, 541 U.S. 36, 68 (2004). Crawford teaches that the admission of testimonial hearsay violates the Sixth Amendment rights of defendants under the U.S. Constitution when the admission of the hearsay testimony results in depriving defendants of their right to confrontation and cross-examination of witnesses against them. The record shows that the trial judge, in this case, over-ruled the timely objections of petitioner's attorney to hearsay testimonial statements in each of the above

witnesses by allowing the out-of-court statements under the hearsay exception and the judge specifically stated that the Crawford case did not apply (See App. page A10). Additionally, both the petitioner's attorney and the prosecutor testified in their closing comments that the witness or victim did not show up to trial or was otherwise unavailable to testify to the hearsay out-of-court testimony provided by the three state witnesses (See App. pages A36 and A37). Petitioner believes that under the record of evidence in this case Crawford v. Washington, supra, applied to this case to preclude admission of the hearsay testimony and that the State trial court erroneously applied Crawford to admit hearsay testimony under the State's exception to the hearsay rule, resulting in the violation of petitioner's Sixth Amendment right to confrontation and cross-examination.

Furthermore, according to the Texas Rules of Appellate Procedure 33.1(a)(1)(A), in order to preserve a compliant for appellate review, the record must show, among other, that the complaint was made by a timely objection that stated the grounds for the ruling that the complaining party sought for the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. (See App. page A42) In the instant case, the trial court was aware that petitioner's attorney timely objected to hearsay testimony, and while the petitioner's attorney did not use the words "Confrontation Clause" in his grounds for the objection, the trial court was aware that the specific grounds of the objection were apparent from the context, in accordance with the Texas Rules of Appellate Procedure 33.1(a)(1)(A). Accordingly, the record of petitioner's case preserved the error for appeal, contrary to the Texas Court of Appeals, Seventh District's decision that the trial court's error was not preserved. Petitioner believes that the Court of Appeals decision to affirm the trial court's decision and resulted in violating the petitioner's right to confront the witness under

the Sixth Amendment to the United States Constitution and consistent with Crawford v. Washington, 541 U.S. 36 (2004). In Davis v. Washington, 126 S. Ct. 2266, 2273-2274 (2006) the U.S. Supreme Court ruled that testimonial evidence is a violation a defendant's Sixth Amendment rights under the United States Constitution when circumstances objectively indicate that there is no on-going emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Although the instant case was fully briefed before Davis v. Washington, supra, case decision was issued, the record in the instant case did not objectively indicate that there was any on-going emergency (See App. pages A14 and A16) and the State provided no information in the record to show why the witness was unavailable at trial, although it was clear that the witness was unavailable. Petitioner, through his attorney, had an opportunity to cross-examine the witness prior to trial through depositions and interrogations made under oath but did not do so. Petitioner did not have an opportunity to cross-examine the witness during the pre-trial police interrogation. The petitioner did not have a prior opportunity to cross-examine the witness as required by Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 126 S. Ct. 2266 (2006).

Therefore, the trial court clearly violated the United States Constitutional rights of the petitioner by allowing out-of-court (hearsay) testimonial evidence in trial after the trial court attorney timely objected to hearsay and petitioner's Sixth Amendment rights were violated even though petitioner's attorney did not mention the words "Confrontation Clause" in the connection with the hearsay objections because the grounds for the objection were understood within the context of the objection as the record demonstrates. The Supreme Court held in Davis v. Washington, 126 S.Ct. 2266 (2006) that any statement given to a police officer in a non emergency situation is testimonial

and, therefore, a violation of defendant's constitutional rights under the Sixth Amendment when admitted in court as hearsay. The trial counsel herein timely and specifically objected to hearsay and the trial judge allowed the out-of-court testimony of the officer under a hearsay exception rule which is a violation under the ruling of Davis v. Washington, 126 S. Ct. 2266 (2006). The error was preserved in trial, the Sixth Amendment rights of the Petitioner were violated, and the Petitioner is entitled to a reversal and a new trial and hereby requests this Court to reverse and remand this case for a new trial.

II. The failure of a defendant's attorney to specifically use the words "Confrontational Clause" in the objections at trial constitutes a "plain error," according to U.S. v. Cromer (389 F.3d 662 (6th Cir. 2004)) and resulted in abridging the rights of a defendant to confront the witness against him. Thereby, depriving the defendant effective counsel, prejudiced the defense, and denied defendant a fair trial, according to Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 126 S. Ct. 2266 (2006) and pertaining to the Strickland v. Washington, 466 U.S. 668 (1984) case?

The Court of Appeals stated in its opinion that Petitioner "As a prerequisite to appellate review, a defendant must make a timely request, objection, [or] motion stating the grounds with sufficient specificity to apprise the trial court of his complaint. However, if the Court of Appeals resolves the first issue above, then the trial counsel's performance fell below an objective standard of reasonableness because he did not use the specific words "Confrontation Clause" in his objection and this was a serious and material omission of the counsel's performance that prejudiced the defense and denied the Petitioner a fair trial (Strickland v. Washington, 466 U.S. 668 (1984)). In addition, because of this serious and material

omission by the trial counsel of failing to use the specific words "Confrontational Clause," to preserve error in trial court, Petitioner's counsel's conduct fell outside the wide range of reasonable and professional representation (Strickland v. Washington, 466 U.S. 668 (1984)). In addition, having held that trial counsel was specifically required to use the word "confrontation", in order to preserve error on Confrontation Clause grounds, it can only be assumed that his performance was deficient, per the Strickland holding. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2042, 80 L.Ed., 2d 674 (1984).

Since the Court of Appeals ruled and opined in their opinion dated August 15, 2006, the trial counsel's performance (as stated above) was clearly and seriously deficient and is entitled to a new trial because the trial counsel did not use the specific words "Confrontational Clause," as the State argues. The petitioner must rely on his trial counsel to object in specific terms and in this case since the court of appeals ruled that a timely or specific objection is required, it was a substantial deficiency by the trial counsel and, therefore, both the trial court and the trial counsel denied the Petitioner a fair trial.

Furthermore, since the Court of Appeals opined in its opinion on August 15, 2006, in the case of United States v. Cromer 389 F.3d 662 (6th Cir. 2004), "When an appellant fails to object to an error in district court, this Court reviews for plain error." Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); United States v. Koeberlein, 161 F.3d 946, 949 (6th Cir. 1998). Plain error review applies even if the forfeited assignment of error is a constitutional error. (United States v. Jones, 108 F.3d 668, 676 (6th Cir. 1997)). Pursuant to plain error review, an appellant court may only correct an error not raised at trial if there is "(1) 'error,' (2) that is 'plain,' (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461,

466-67 (1997) (quoting United States v. Olano, 507 U.S. 725,732 (1993)). "If all three conditions are met, an appellant court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings,'" Johnson at 467(quoting Olano, 507 U.S. at 732(internal quotations marks omitted).

Therefore, the Cromer ruling states that if there is a violation of the "Confrontation Clause," as in the instant case, then it amounted to a plain error. In light of the Crawford v. Washington and Davis v. Washington rulings, the error is "plain." Based on Crawford and Davis' affirmation of the importance of the constitutional right of confrontation, it is readily ascertainable that Petitioner's substantial rights were affected by this violation and amounts to an ineffective assistance of counsel. In this case, the issue of whether the Petitioner committed the offense, the admission of the hearsay statements tying the Petitioner to the crime likely impacted the outcome of the trial. Because this plain error compromised the fairness and integrity of Petitioner's trial, Petitioner believes and respectfully requests this Court to reverse and remand this case for a new trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael J. Coy,
Petitioner – Pro Se
907 Victoria Ridge Dr.
Pflugerville, TX 78660
(512) 632-0026
(512) 670-1032

APPENDIX A

COURT OF APPEALS
DECISION
DATED AND FILED
August 15, 2006
Peggy Culp
Clerk of Court of Appeals

Appeal No. 07-06-0156-CR
County Ct. No. 4 of Travis County
No. 703172

STATE OF TEXAS
IN THE COURT OF APPEALS
FOR THE SEVETH DISTRICT OF
TEXAS AT AMARILLO
PANEL D

MICHAEL JESUS COY,

DEFENDANT-APPELLANT,

V.

THE STATE OF TEXAS,

APPELLEE.

APPEAL from the judgment of the County Court at Law No. 4 of Travis County: HONORABLE MICHAEL DENTON, Judge. *Affirmed.*

Before QUINN, C.J., and REAVIS and CAOPBELL, JJ.

MEMORANDUM OPINION

REAVIS, D. Following a plea of not guilty, appellant, Michael Jesus Coy, was convicted of assault by bodily injury and sentenced to one year confinement and a $4,000 fine, probated in favor of one year community supervision. Presenting three issues, appellant contends (1) the hearsay statements of the victim admitted over his objection violated his right to confrontation under the United States Constitution, (2) he was denied effective assistance of counsel, and (3) the evidence was factually insufficient to support this conviction. We affirm.

In June 2005, appellant was arrested and charged with assaulting his wife during a dispute at the couple's home. Despite multiple subpoenas, the victim failed to appear for trial. The State proceeded with its case by offering the victim's statements through the testimony of the two police officers who investigated the complaint. Counsel of appellant objected to hearsay; however, the court admitted the testimony under the excited utterance exception of Rule 803(2) of the Rules of Evidence. Appellant was subsequently convicted of the offense.

By the first issue, appellant contends that by admitting the victim's out-of-court statements, the trial court violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. Although he concedes that he did not object on constitutional grounds at trial, appellant maintains that because the State mentioned the case of Crawford v. Washington, 541U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), he was not required to make a separate Confrontation Clause objection. We disagree.

As a prerequisite to appellate review, a defendant must make a timely request, objection, or motion stating the grounds with sufficient specificity to apprise the trial court of his complaint. Tex. R. App. P. 33.1.(a). The purpose of this requirement "is to give to the trial court or the opposing party the opportunity to correct the error or remove the basis for objection." Martinez v. State, 22 S.W.3d 504, 507 (Tex.Cr.App. 2000). Recently, the Court of Criminal Appeals has made it clear that an objection to hearsay does not preserve error on Confrontation Clause grounds. Reyna v. State, 168 S.W.3d 173, 179 (Tex.Cr.App. 2005); Paredes v. State, 129 S.W.3d 530, 535 (Tex.Cr.App. 2004). In addition, objections below that do not comport with those uttered on appeal are generally not preserved for review. Wilson v. State, 71 S.W.3d 346, 349 (Tex.Cr.App. 2002). Consequently, appellant's first issue presents nothing for review and is overruled.

Alternatively, by his second review, appellant argues that because counsel failed to preserve error on Confrontation Clause grounds, he received ineffective assistance of counsel. We disagree.

Ineffectiveness of counsel is reviewed under the standard in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under Strickland, a defendant must establish (1) counsel's performance was deficient (i.e., fell below an objective standard of reasonableness), and (2) there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different, a reasonable probability being a probability sufficient to undermine confidence in the outcome. Rylander v. State, 101 S.W.3d 107, 110 (Tex.Cr.App. 2003); Hernandez v. State, 726 S.W.2d 53, 55 (Tex.Cr.App. 1986). In other words, appellant must demonstrate by a preponderance of the evidence that the deficient performance prejudiced his defense. Mitchell v.

State, 68 S.W.3d 640, 642 (Tex.Cr.App. 2002); Thompson v. State, 9 S.W.3d 808, 813 (Tex.Cr. App. 1999). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Thompson v. State, 9 S.W.3d at 814 (citing Strickland, 466 U.S. at 700). The adequacy of defense counsel's assistance is based upon the totality of the representation rather than by isolated acts or omissions of trial counsel. Id. Although the constitutional right to counsel ensures the right to reasonably effective counsel, it does not guarantee errorless counsel whose competency or accuracy of representation is to be judged by hindsight. Ingham v. State, 679 S.W.2d 503, 509 (Tex.Cr.App. 1984); Ex parte Kunkle, 852 S.W.2d 499, 505 (Tex.Cr.App. 1993). Furthermore, appellant review of trial counsel's representation is highly deferential and presumes that counsel's conduct fell within the wide range of reasonable and professional representation. See e.g. Andrews v. State, 159 S.W.3d 98, 101 (Tex.Cr.App. 2005); Bone v. State, 77 S.W.3d 828, 833 (Tex.Cr.App. 2002). To defeat the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record. Thompson, 9 S.W.3d at 813-14.

In the present case, the record fails to demonstrate counsel's performance fell below an objective standard of reasonableness. Counsel vigorously cross-examined the State's witnesses, attempted to discredit their version of events, and repeated attacked the State's failure to produce the photographs of the victims injuries. He also made pertinent objections throughout the trial, most notably, he lodged a valid, albeit unsuccessful, hearsay objection under the Rules of Evidence prior to the introduction of the witness out-of-court statements. Contrary to appellant's assertion, there are a number of conceivable reasons why counsel might have declined to object on confrontation grounds. For example, as the State points out, he may have simply

believed that the testimony was admissible, making an objection inappropriate. See Thompson, 9, S.W.3d at 814.

Based on the record before us and provided the presumption that trial counsel's conduct fall within the wide range of reasonable and professional representation, no reversible error is demonstrated. See Bone, 77 S.W.3d at 833; Mallett v. State, 65 S.W.3d 59, 63 (Tex.Cr.App. 2001). Appellant's second issue is overruled.

By his third issue, appellant claims that without the victim's hearsay statements, the State's evidence is factually insufficient to support his conviction. However, we conduct a factual sufficiency analysis by considering all the evidence before the jury—whether proper or improper—so that we can make an assessment from the jury's perspective. Miles v. State, 918 S.W.2d 511, 512 (Tex.Cr.App. 1996). Because we cannot conduct a sufficiency review without considering the victim's out-of-court statements, appellant's third point presents nothing for review and is overruled. Fuller v. State, 827 S.W.2d 919, 931 (Tex.Cr.App. 1992).

Accordingly, the trial court's judgment is affirmed.

Don H. Reavis
Justice

Do not publish.

APPENDIX B

OFFICIAL NOTICE FROM

COURT OF CRIMINAL APPEALS

OF TEXAS

Wednesday, February 28, 2007
Re: Case No. PD-1559-06
COA#: 07-06-00156-CR
STYLE: COY, MICHAEL JESUS

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Louise Pearson, Clerk

APPENDIX C

STATE OF TEXAS
IN THE COUNTY COURT
AT LAW NUMBER FOUR
TRAVIS COUNTY, TEXAS

Cause No. 703,172

THE STATE OF TEXAS, Plaintiff,

-vs-

MICHAEL COY, Defendant.

TRIAL BY COURT

On the 14th day of November, 2005 the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Mike Denton, Judge presiding, held in Austin, Travis County, Texas.

APPEARANCES

Ms. Sue Beckage
Assistant County Attorney
P.O. 1748
Austin, Texas 78767
SBOT# 24045467

FOR THE STATE

Mr. Jesse Carrillo
Attorney at Law
906 Nueces
Austin, Texas 78701
SBOT# 03879500

FOR DEFENDANT

STATE'S WITNESSES:

BODDY WARREN
AARON HAWKINS
JUDY ALLAN

DEFENDANT'S WITNESSES:

MICHAEL COY
PHILLIP COY

PROCEEDINGS
(Excerpts)

(R.R.Vol. I, P. 3, L. 3 – L. 24)
THE COURT: Let's go on the record in Cause No. 703,172.
MS. BECKAGE: Basically the State is asking to abandon one portion of the information and complaint and that would be the statement where the complaint states that Michael Coy pushed Sylvia Coy on and about the torso with the defendant's hand we'll ask to go ahead and abandon that.
THE COURT: Certainly. Anything else from either side?
MS. BECKAGE: No, Your Honor.
THE COURT: Is there a jury waiver, counsel?
MR. CARRILLO: Well if there isn't we'll provide one.
THE COURT: Let me see if there is. I do have a copy of a jury waiver signed by all parties which I will sign and make part of the record. And lastly counsel does your client waive the reading on the information or do you wish me to have that done.
MR. CARRILLO: Can you read the information, Judge?

(R.R.Vol. I, P. 4, L. 13 – L. 15)
MS. BECKAGE: At this time the State is going to waive our opening and call Officer B. Warren to the stand.

BODDY WARREN
DIRECT EXAMINATION

BY MS. BECKAGE:
(R.R.Vol. I, P. 9, L.24 – P. 12, L. 10)
Q. What did she say happened:

MR. CARRILLO: Objection, hearsay your Honor.

MS. BECKAGE: Judge, at this time the State believes that we have layed the necessary predicate for an excited utterance under Crawford. [T]he officer has testified that the victim in this case was crying, she seemed to be fearful, she was hiding in a closet and that she was under stress of an exciting event. So at this point, Your Honor, I believe that this is no longer hearsay, in fact it's an exception to hearsay at this point.

THE COURT: Yes, sir.

MR. CARRILLO: Judge, an excited utterance is exactly that, it's one utterance when the circumstances dictate that there's some exciting factors involved, like if somebody has a car accident they jump out of the car and they say I'm sorry I didn't see you, or I didn't see the sign, or I didn't seethe child, or I didn't, it's one utterance. But here what is happening is he is talking – he is with the woman and now he's asking her questions and he's going to elicit not one utterance, but a series of responses to questions. And I submit that is not one excited utterance it's something different. Now they're trying to make it an excited narrative which I think violates the hearsay rule and I don't think it's covered by excited utterance.

THE COURT: Anything else from side?

MS. BECKAGE: My understanding Judge is that an excited utterance like hey or you. An excited utterance can be a series of things said it just depends what amount the declarant is still dominated by emotions, excitement, fear, or pain. And clearly this woman being in a closet was in fear of

something, and under Crawford those types of things crying, fear, stress, intimidation, are all predicates along with non-testimonial. This officer testified that basically he said what's going on because he probably had to determine what happened, how to deal with the situation.

THE COURT: Anything else either side?

MS. BECKAGE: No, Your Honor.

MR. CARRILLO: Nothing.

THE COURT: State I'm not sure that you cited the right case, the case you cited I don't recall the term excited – well footnote perhaps. However, as to the issue of is this an excited utterance or not while questions whether or not questions are asked or not is one of the things that must be considered I believe by the Judge. The mere fact that as a response to a question does not make it a non-excited utterance. As to the issue of is it an excited utterance or not, somebody in the closet hiding in the closet perhaps, observation of the marks or injuries depending on how you characterize that along with the officer's catalog of the symptoms that he observed, visibly upset, fearful, shaking, et cetera, I do believe that the statements I'm about to hear are do fall under the excited utterance and I will allow it. If there's additional evidence in future there may or may not be I'll certainly entertain objections at that time. But as to what I heard so far I overrule the objection. Please proceed.

(R.R.Vol. I, P. 14, L. 18 – 22)
A. Okay. She stated upon them arriving home that they began to argue, Mr. Coy was yelling loudly at her and waiving his arms around. Mrs. Stated she became fearful, went into the bathroom slash closet area and locked the door.

(R.R.Vol. I, P. 13, L. 3 – 6)
A. Yes, ma'am. She stated that in the morning time Mr. Coy began banging on the door to get into the closet, she opened the door and at which time they began to argue again.

CROSS-EXAMINATION

BY MR. CARRILLO:

(R.R.Vol. I, P. 20, L. 1 – 9)

Q. When you received this call about a verbal disturbance were you the first officer to get that or had Officer Hawkins gotten that same call?

A. I was originally given the call on the radio, sir.

Q. So Officer was there for a another reason?

A. Sergeant Hawkins was originally there to back me up, yes, sir.

R.R.Vol. I, P. 20, L.1 – 15

Q. Okay. And you never got a call that there was any violence or any type of assault going on when you got the call; is that right?

A. On the radio, no, sit.

Q. Just verbal, just an argument?

A. Yes, sir.

Q. Where are the photographs?

A. Sir, I believe the photographs are kept digitally on file at the Pflugerville Police Department, I'm not sure if there are actual physical copies of them in our records division.

Q. Did you ever develop them, did you ever see them?

A. Personally no sir, I did not.

MR. CARRILLO: Pass the witness.

(R.R.Vol. I, P. 20, L.21 – 24)

THE COURT: One question, if photos are an issue and if they are digital, well, I'll let the lawyers do what they need to do. Thank you officer for your testimony you're excused. Call your next witness.

AARON HAWKINS
DIRECT EXAMINATION

BY MS. BECKAGE:

(R.R.Vol. I, P. 27, L.24 – P. 29, L 11)

Q. And do you recall that she said anything regarding what had happened?
A. Yes. After I spoke to Officer Warren I approached her also to find out.

MR. CARRILLO: Judge, this is going to be accumulative, and if it was – one objection, objection two is that it was an excited utterance before it can't be an excited utterance again, so we object for that second reason.

MS. BECKAGE: And Judge I guess I would make the same argument that this time frame in which she had called the officers and she was crying fearful and shaking, was a period in which she was under extreme excitement, emotion, fear, pain, of the event that occurred. So, an excited utterance doesn't have to end after a certain amount of time, it can continue for a period, I guess depending on the stress of the event. So I would say these are still excited utterance.

THE COURT: Just so I understand, are you asking the sergeant to repeat what we've already heard, the testimony of what the officer received or is this an additional statement?

MS. BECKAGE: I was hoping to see if there were any additional things that he had heard, but if there is not I will cut off.

MR. CARRILLO: How are we going to know that?

THE COURT: Well as to the issue of whether or not it's an excited utterance or not, again questions are an element, but what I heard the sergeant testify to is an individual who was crying, shaking, very nervous, so nervous to the point that they kept checking to see to make sure that the officers remained at her sight and trying to see where her husband was located. All that together certainly underscores an excited utterance, so as to an objection I do think this fits within you've shown excited utterance so I'm going to overrule the objection at least on that basis, go head.

CROSS-EXAMINATION

BY MR. CARRILLO:

(R.R.Vol. I, P. 33, L. 12 – P. 41, L. 1)

Q. Did you put in your report that somebody had told you the boy was not present when this had happened?

A. No it's not notated in the report.

Q. Did you put in your report that Mrs. Coy was curious as to where Mr. Coy was located?

A. No, I did not.

Q. Did you put in your report the phrase that she was very scared?

A. I may have I have to read that to find out.

Q. If your don't mind Officer, it's only about a half a page long.

A. I stated that she was in fear for her safety and had locked herself in the closet due to fear.

Q. I know but did you use the phrase very scared?

A. No.

Q. Did you use the phrase very nervous?

A. No.

Q. Did you use the word shaking?

A. No.

Q. And did you take photographs?

A. I did not, no.

Q. And you said that there was redness of skin that it would lead to bruising?

A. Yes.

Q. So did you follow up with Mrs. Coy and did you ever see her again?

A. I have not, no.

Q. So you don't know whether you were correct in whether or not she did have bruises?

A. Correct.

Q. The report that you got over the dispatch by the dispatch is that there was a verbal disagreement not any violence; is that correct?

A. The way dispatch calls out or calls, is they will say disturbance and they will either say disturbance in progress

or disturbance prior, and then when you advise them that you're in route then they'll usually go into further detail and state whether or not it's physical or verbal, and that is to whether or not you need to speed up your reaction or whether or not you can proceed on a normal.
Q. As far as you remember did you get any indication that it was physical from the dispatcher?
A. No, I did not.
Q. And when you were talking to Mr. Coy did he ask you if you could help him get Mrs. Coy off the premises?
A. Once we were – once Mr. Coy had been placed under arrest he asked what was going to happen to her and can we get her, can we get her to leave.
Q. Is that all that happened, he didn't ask you anything else, any more assistance to get her off the premise?
A. Well we advised him of a criminal trespass warning and we would have her removed.
Q. And did he call you first about a criminal trespass warning for her?
A. No.
Q. Did you discuss a criminal trespass warning with him?
A. Yes, I did.
Q. Okay. And did you help him fill out, did he say well can I make a request?
A. No, I did not have a criminal trespass form with me. Officer Warren I believe is the one that executed that.
Q. So did you hear him talking to Officer Warren about a criminal trespass warning?
A. I don't recall if they spoke about that, no.
Q. Officer, let me hand you what has been mark as Defendant's Exhibit No. 1, can you identify that in general please if you don't mind?
A. That is a criminal trespass warning.
Q. Did you sign that form?
A. Yes, I did.
Q. And does that have Mr. Coy's name on it?
A. Yes, it does.

Q. What date does that have?
A. 6/13/05.

MR. CARRILLO: Your Honor, we offer Defendant's No. 1.

MS. BECKAGE: Unless the proper predicate is laid for this I'm going to object that it's hearsay.

THE COURT: Is that the criminal trespass warning?

MR. CARRILLO: Yes, your Honor.

THE COURT: It will be admitted over objection, go ahead.

Q. (By Mr. Carrillo) Officer, can you explain how this Exhibit No. 1 came into being?
A. No, I do not understand your question, what do you mean came into being?
Q. I mean why did you sign it or how –
A. Why is my signature on it?
Q. Yeah – why did you fill it out, why did you sign it why—
A. Per the request of Mr. Michael Coy a trespass warning was issued. It's common practice that to speed up the process of what is occurring on the scene I sign the citation and I believe Officer Warren then issued it or gave it to the person. If I recall correctly Officer Warren and the victim services person was there for an extended period of time after me and Mr. Coy had already left.
Q. All of that is in your handwriting; is that correct?
A. Yes I would think except for the signatures and I believe the officer number that is written down there where it say CTW, that is not my handwriting which would indicate that it was added by the other officer that completed the rest of the form.
Q. So if Officer Warren testified that he didn't have anything to do with the trespass or anything else that he would be wrong or would he be correct?
A. I couldn't tell you what he testified to, I'm sorry.
Q. When you testified a minute ago that you didn't have anything to do with the trespass warning –
A. I did not request that Sylvia Coy sign that, no.

Q. My question is, a minute ago when you testified that you didn't have anything to do with the trespass warning or trespass form, your memory was faulty; is that correct?
A. I don't believe I said I had nothing to do with it.
Q. You said you didn't have a trespass form with you?
A. Correct. We carry these in our cars they're identical forms for every officer, which means I probably did not have one but Officer Warren did.
Q. All right. And do you keep the photographs of this victim?
A. I don't keep any photographs, no, sir.
Q. Where would the photographs be?
A. They would be turned into criminal investigations division.
Q. Did Mrs. Coy have any marks on her face?
A. Not that I noticed.
Q. Did her hair appear to be messed up?
A. It would be your definition of messed up, it did not appear to be out of the ordinary.
Q. Okay. Did any of her clothes appear to be torn?
A. No.
Q. Did she have any dirt on her clothes or her body as if she had fallen down or been pushed down or had been on the ground?
A. No.
Q. When you arrived at the house was there anything that would make you suggest there had been a struggle such as a chair overturned or maybe something broken on the floor, or a lamp overturned, anything like that?
A. No.
Q. The house was normal I guess whatever that means.
A. Depending on again your definition, by yes.
Q. And there were no broken windows?
A. No. The front door as you can tell was not wide open or anything like that?
A. I had gone through the garage area I never checked the front door.

Q. So apart from what Mrs. Coy told you it appeared to be normal unusual going on in the house?
A. Other than the marks on her and her physical demeanor.
MR. CARRILLO: Pass the witness.
MR. BECKAGE: I just have a couple of more questions.

REDIRECT EXAMINATION

BY MS. BECKAGE:
(R.R.Vol. I, P. 40, L.5 – P. 41, L 1)
Q. Did Mr. Coy –so what did Mr. Coy ask you about a criminal trespass, did you say it was before he was arrested or after?
A. I am pretty sure it was before, and he also had called me several days after the arrest and asked again about.
Q. But as far as you were concerned you weren't there on a criminal trespass issue?
A. Correct.
Q. When did he ask you about this? How many minutes after your arrival?
A. It was after his arrest that I believe his arrest?
Q. And at what point after his arrest?
A. After Mr. Coy was placed in the handcuffs we remained on site for approximately 15 minutes. He was waiting for another subject to arrive, I believe another family member to take his son to the golf tournament and then he started asking me what's going to happen to her what's going to happen to my house.

JUDY ALLAN
DIRECT EXAMINATION

BY MS. BECKAGE:
(R.R.Vol. I, P. 44, L.7 – P. 46, L. 22)
Q. And without going into anything she said to you, what made –what in her either physical demeanor or her emotional

demeanor made you believe that she wanted to have an EPO in place?

MR. CARRILLO: Judge, I think that is irrelevant, she got an EPO and what else is there, what relevance is that further line of question?

THE COURT: Ma'am?

MS. BECKAGE: I was just trying to ask the witness kind of like if she was reluctant to get one or if she really wanted one.

THE COURT: Okay. And counsel without saying what I think, counsel said that that's irrelevant whethershe really wanted one or didn't really want one.

MS. BECKAGE: I think it's relevant because the victim obviously isn't here today so I'm trying get the frame of her mind in terms of whether or not she really wanted protection.

THE COURT: So you're saying?

MS. BECKAGE: I'm saying that it is relevant, Your Honor.

THE COURT: For what reason that's all I'm asking.

MS. BECKAGE: For I guess her, it's relevant to just show that she was in fear of the defendant other than in this particular at this time, that she was in fear of him in general.

THE COURT: Anything else from either side?

MR. CARRILLO: No.

THE COURT: Objection is overruled, go ahead.

A. Would you repeat the question?

Q. What was her either her physical state or her emotional state when you asked her if she wanted an EPO and you said she agreed to one, can you recall what her physical or emotional state was at the time?

A. She was off and on, voice shaking, tearful, off and on, and that's all I can say without going into what she said.

Q. So you went ahead and filed the EPO?

A. Yes, ma'am. Generally I'll find out the next day or two from the disparchers.

Q. Okay. And by any chance while you were there did you talk directly to her, obviously that's correct?
A. Yes, ma'am.
Q. Did you notice any physical injury on her at the time?

MR. CARRILLO? Judge, this is going to be accumulative if it's relevant.

MS. BECKAGE: I'm just trying to corroborate her injuries that's all Judge.

THE COURT: I'll let her say what she saw or didn't see.

A. Because I didn't take photographs of the injuries I didn't pay much attention to, I mean other then being told by the officers where the injuries were I couldn't tell you whether I saw them or not, I don't remember.
Q. That's fine. Did she appear to by in pain?
A. She would hold her arm occasionally.
Q. What part of the her arm, can you recall?
A. Kind of the upper arm above the elbow and a couple of times she touched her forearm.

MS. BECKAGE: I pass the witness.

CROSS-EXAMINATION

BY MR. CARRILLO:
(R.R.Vol. I, P. 46, L.25 – P. 47, L. 14)
Q. Ms. Allan did you make a report in connection with this incident?
A. Not within the offense report no, I have a small report that I do just to keep my statistics on that's not filed, no.
Q. Did you make a copy of that report?
A. The prosecutor has it.

THE COURT: Please show it to opposing counsel.

MS. BECKAGE: Sure.

Q. (By Mr. Carrillo) And you read this report before you came to testify; is that right?
A. I just printed out a copy of it.
Q. You didn't read it?

A. I just looked over it to make sure I had the right report.
Q. Okay. Well would it surprise you to know that there's nothing in there that says her voice was shaking or that she was tearful?
A. I don't put those kinds of things in my reports. Like I say that report is strictly for my statistics.
Q. So you're saying that now, on November the 14th you remember that back on June 13th this particular person, this woman, when she was speaking to you her voice was shaking and she was tearful, is that right?
A. Yes, that's correct.
Q. Even though you've had lots of other victims that you've talked to between then and now; is that correct?
A. That's correct.
Q. Did you see the photographs that were taken in this cause?
A. No, sir.
Q. Do you know where they are?
A. No, sir.

MR. CARRILLO: No further questions.

MICHAEL COY
DIRECT EXAMINATION

BY MR. CARRILLO:
(R.R.Vol. I, P. 51, L.9 – P. 63, L. 19)
Q. On the Friday before this event did you call your wife Sylvia Coy?
A. I did call her.
Q. And where was she?
A. She was at work in San Antonio, Texas
Q. And what did you tell her?
A. We were planning for the weekend and I called to let her know that Phillip was going to be coming home on Sunday at six as oppose to Monday morning because of his mom owed me some time, and he decided he wanted to come home early on Sunday evening.

Q. And then was Sylvia suppose to come from San Antonio to Austin on Friday?
A. Yes. Normally on the weekends either I would go to San Antonio or she would come in, and when I do have my son she would come in from San Antonio. But she decided she would come in to Austin that weekend.
Q. And after you speak with her on Friday did she become angry?
A. Yeah, very upset?
Q. Why did she become upset?
A. Because she was upset that Phillip was coming home on Sunday as oppose to Monday.
Q. And did she want to be able to make that decision?
A. She told me that I needed to ask her first before I can say yes to my son coming home on Sunday evening.
Q. And did you and she have an argument as a result?
A. Well she got upset about it and she basically hung up the phone, and about half an hour later she called me back and she was questin me about the fact that I didn't ask her first before I said yes to Phillip and I told her basically that is his home, this is where he lives, if he wants to come home he can. And then she tells me I'm not coming in this weekend to Austin and she hung up the phone.
Q. And then so you didn't expect her?
A. I did not expect her the whole weekend.
Q. So then did she show up all of a sudden on Friday night?
A. Yes. I was on the phone approximately 10:00 p.m. on Friday night talking to a friend of mine out of California, and she surprised me by coming to the home about midnight our time.
Q. And then –
A. I'm sorry, it was ten o'clock California time it was midnight our time.
Q. And then did ya'll have an argument when she arrived from San Antonio?
A. Oh yeah, she was very upset with me for not checking with her first before I said yes to Phillip.

Q. And then did she stay that weekend, that Friday?
A. No she came in and she picked up the phone and she said she was going to call the police on me and I said why and she said because I'm your wife and I can. And I said no you need to leave you can not be here at the house you need to get out of here. And she wouldn't she kept looking over, I was sitting on the sofa watching T.V. and she kept looking over me asking me why I didn't check with her first before saying yes to Phillip. And I basically told her this is his house if he wants to come home that's it, he's my son and it's a package deal.

And she got upset with me got her clothes and she went out to the car and she came back inside to get her dog, and she put her in the car and came back in to get more of her things and she kept telling me why I wouldn't check with her first, and it's never been a problem in the past so I didn't feel the need to check with her because we've done this many occasions. So she kept asking me to talk to her about it and I wouldn't so I tried to guide her out of the house and she wouldn't leave, I said you need to leave the house. So as I went out I ran next door to the neighbor so I can get some help to help me remove her, she grabbed me and wouldn't let go of me I said Sylvia you can not be here you have to leave.
R.R.Vol. 1, P. 54, L.23 – P. 55, L. 11
Q. And then later on I guess by then this was Saturday morning, did she call you again Saturday night?
A. Saturday night about nine o'clock she called me and told me she was crying all day, she was miserable and she kept asking me about Phillip, and I said Sylvia I'm not going to talk to you about Phillip we already know that Phillip is my son, this is his home and if he wants to come home early he can. We had Friday, Saturday, Sunday to do whatever we wanted to do, this is Sunday night the day before school. So she said well can I come and see you and I said only if we don't argue and fight about this, okay, so she came in about midnight on Saturday night and at that point everything appeared fine.

R.R.Vol. I, P. 56, L.22 – P. 57, L. 2
Q. They're accusing you of yell at her and threatening her on the way home, did that happen?
A. No it did not. I was as quiet as a mouse, I didn't say a single word. My son knew I was upset because usually I talk to him when he gets in the car and I just stayed quiet the whole way.
Q. Then what happened when you got home Sunday?
A. We went home....Phillip asked Sylvia what's wrong with dad, and I told Sylvia I'm going to tell him what's wrong with me, so I explained to Phillip that she was upset for me parking so close to his mom which is the same exact thing we've done for five year, and that we're leaving now to pick up Sylvia's car. Phillip and I went outside to get in the car and Sylvia decides that she didn't want to go, I said Sylvia we have to pick up your car now because Phillip has got a tournament in the morning, it's a school event, a competition, and I have to take him to school I can not take you to pick up your car on Monday morning because I'm going to be at the golf course with him. And then she walked out and she said that's okay I'll get someone else to do it for me....

So she walks in and I tell Phillip let's just go inside and just forget about it we'll just be concerned about us right now. So we walked inside to go watch the Texas was playing for the National Championship that night so we were watching the game. Sylvia went in the bedroom, the master bedroom and she started watching T.V. and this is approximately about 6:15 pm that night because as I recall we picked him up at six o'clock, so about 6:15 Phillip and I were watching T.V. in the living room and she was in thet bedroom watching T.V. About an hour later Phillip gets hungry he wants to order pizza, so I ask him to get the phone from the bedroom and –

MS. BECKAGE: Your Honor, at this point I'm going to object to the narrative.

THE COURT: Sustained.

Q. (By Mr. Carrillo) So did anything happen Sunday evening that's ususual?
A. As I said Phillip went to the bedroom and he noticed that Sylvia was not in the bedroom any more. He got the phone from our bedroom and he got the phone and he said that Sylvia was in the bathroom and I said okay....
Q. Did she stay in the bathroom all night?
A. As far as I know from the time I went to bed about 10:30 or 11:00 she was still in there.
Q. Did you have an argument before she went into the bathroom?
A. Oh no.
Q. Then in the morning –
A. We had no conversation.
Q. Then in the morning they're saying that you were banging on the door, were you banging on the door?
A. No, my son woke me up at 5:30 because he was getting ready to, he wanted to start getting ready. I went to the bedroom and she still the bed wasn't laid in, so I made –well she's got to be in the bathroom, it didn't appear the light was on, so about a half an hour later I went back in and I knocked on the door and said Sylvia you have to get out of the bathroom I have to get ready and take Phillip to the golf course. I went out to the living room waited a few minutes, went to check on Philip and she still hadn't come out. About 15 minutes later I went back into the bathroom and she still wasn't out so I knocked on the bathroom a second time and she wouldn't get out.

I went back to the living room waited and waited and Phillip was about ready, I went back to the bedroom the third time and knocked, I said Sylvia you need to get out now because Phillip has a got a golf tournament I have to take him to, so as I walked out of the bedroom she come out, she just opened the door and just walked out. And she was on the phone, and I don't now what she was doing on the phone, I went into the bathroom to brush my teeth and get my clothes. So after I washed up and everything I went back out of the

room to check on Phillip to see how he was doing. About five minutes later I went back to the bathroom and she, I went to call my dad because I needed him to come pick up Sylvia to take he to go pick up the car. So when I came back out to check on Phillip she was on the phone talking to my dad, I had hung up the phone with my dad and when I came back in there she was on the phone talking to my dad. And that's when I told her give me the phone so I can talk to him so he can pick you up, so I got the phone told dad, and my dad says okay, hung up, I left the room to go check on Phillip to see if he was ready. I went back into the bedroom again, went to the closet to get my clothes and that's when I saw Sylvia in the closet, the closet is through the bedroom, I mean you have the master bedroom, you have the bathroom and then you have the closet. You have to walk through the bathroom to get to the closet, she was in there, I decided I'm not going to be there any more so I left the room. I just left I said Phillip let's go outside and I grabbed the home phone and that's when I called Pflugerville Police asking them to remove Sylvia from the house.

Q. Okay. You called Officer Hawkins?

A. I called dispatch or, I know the number I know the Pflugerville number so I just called them directly.

Q. And then you wanted to get somebody there to help you get Sylvia out of the house?

A. Yes. Officer Hawkins was the first to arrive and that's when I first told him I needed to have Sylvia removed and that's when he told me about the criminal trespass warning.

Q. So the officer went to his car and got –

A. We were like this, we were like two feet fro this car and he went to his car and grabbed that document, he explained to me what it was and what it is so he started asking me my name address and what Sylvia's name is. I didn't know her home address.

Q. So he filled it out and you wanted him to give it to her to tell her that she was not welcomed in your house any more?

A. He wanted to know what happened, basically told him what happened that she had been locked up in the room since six o'clock the night before, and about me picking up Phillip. And then he asked me, then I'm going to go inside and talk to Sylvia and explain this to her and get the relevant information filled out.
Q. So up to the time the officer got there had you hit her?
A. Oh No.
Q. Did you push her?
A. No.
Q. Had you grabbed her by the arms?
A. In fact my son – Sylvia came out of the room on one occasion and talk to Phillip and she was fine she wasn't crying or anything like that.
Q. So you –
A. They had a conversation and she was okay.
Q. So when you were talking to Officer Hawkins about the criminal trespass warning she was on the other line calling the Pflugerville Police Department complaining –
A. That's when I went to the bathroom, I came back out and decided to have her removed. I thought she was talking to my dad again but obviously she was calling the police.
Q. And then after you had been talking to Officer Hawkins then Officer Warren showed up; is that right?
A. Pretty quickly after he got there.
Q. And then you got arrested for?
A. Well when I was talking to Officer Hawkins he wanted to send the officer in to check on Sylvia, and I actually took the officer inside the house, told him where – I have to go get my son, told him where my son was and I directed him to the bedroom where Sylvia was sitting on the bed, not in the closet she was actually sitting on the bed, and I showed Officer Warren there she is sitting on the bed. So I showed him to the bedroom then I went and got my son and brought him outside. And Sergeant Hawkins let me go in the house to show him where she was.
Q. So I'm going to ask you again, did you hit her?

A. No no
Q. Did you push her?
A. No.
Q. Did you grab her arms, leave marks on her arms, or grab her arms at all?
A. No.

MR. CARRILLO: Pass the witness.

CROSS-EXAMINATION

BY MS. BECKAGE:

(R.R.Vol. I, P. 63, L. 20 – P. 64, L. 5)
Q. Mr. Coy I have a few questions for you, what was the reason -- what date – why were you trying to get a criminal trespass warning against Mr. Coy?
A. Because she wouldn't leave. I was asking her to leave, and Officer Hawkins is the one who offered CWT for me and I said what is that and that's when he explained to me what it was. I said well will that get her out of the house because she wouldn't go on her own, so that's when that came in to play.
R.R.Vol. I, P. 66, L. 8 – L. 23
Q. Did he offer that to you prior to your arrest?
A. Oh yeah, oh yeah, this was when he first arrived at the moment he arrived that's I was on the phone talking to dispatch, and I told the dispatch, officers arrived, okay then I got off the phone and that's when he got out of the vehicle and I explained to him the situation and that's when he offered the CTW to me.
Q. And do you recall him testifying that he didn't talk to you about that until after you were arrested?
A. Oh yeah I recall that.
Q. Are you saying that he's not telling the truth?
A. Absolutely. Because that's the first thing we talked about at that moment when he arrived. We were out near the street and he actually went to his car and pulled out his folder that has all the CTW's and started filling it out when he first arrived.
R.R.Vol. I, P. 67, L. 4 – L. 18

Q. And so can you explain how Sylvia was calling 911 while you were on the phone with the police?
A. She had her cell phone with her. She had her cell phone with her the whole time she was in the room from six o'clock Sunday night until the morning she got out of there, you know, on Monday morning. She had her own phone in there to and she never called anybody during that time either.
Q. So my other question would be regarding her calling your father, you testified that you had just talked to your father but yet when Sylvia when to call your father you took the phone away from her because you needed to talk to your father?
A. To come pick her up to take her to go get her vehicle.
R.R.Vol. I, P. 68, L. 7 – P. 69, L. 8
Q. Do you know why Sylvia would fear you?
A. No, I do not.
Q. Do you know why she would be crying, shaking, locked herself in the room all night long?
A. She's never done it before, my son has been there on many occasions.
Q. Do you know why when officers went to talk with her she would can looking kind of, their testimony, she was kind of looking around to see where you were?
A. I can not explain that.
Q. What about the red mark on her arm where it looks like it was starting to bruise, what about that?
A. I didn't touch her, I can not explain that?
Q. Even though there's two people who saw those marks and one person testified that they saw her kind of holding her arm?
A. Well I don't have nails so I don't know what she could been doing between six that night in the closet by herself until six in the morning.
Q. So you're saying she did that to herself to herself?
A. I mean it's possible. I can say that I did not touch her during any of that time.
Q. And you're testifying that you don't know how that happened?

A. I do not know how it happened.

MS. BECKAGE: I pass that witness, Your Honor.

PHILLIP COY
DIRECT EXAMINATION

BY MR. CARRILLO:

(R.R.Vol. I, P. 71, L. 5 - P. 73, L. 18)

Q. Now when your did picked you up was Sylvia Coy in the car?

A. Yes.

Q. And can you tell the Judge when you were going home after he picked you up and ya'll were going home, can you tell the Judge if Mr. Coy was yelling at Sylvia Coy?

A. He was not. She said that he was, but I don't remember him yelling.

Q. I mean was he yelling at her and threatening her?

A. No.

Q. And then did you go directly to the house?

A. Yes.

Q. And that evening did your dad yell at Sylvia Coy?

A. No, he sat down, watched T.V. and about seven I was hungry so I told him to order pizza. He told me to go get the phone and she was in the bathroom.

Q. Sylvia Coy was in the bathroom?

A. Yes.

Q. As far as you know did she stay in the bathroom the whole evening?

A. Yes.

Q. And then did you hear any argument that night on Sunday, any arguing, any yelling?

A. No, I didn't hear anything.

Q. And the next morning the police came and arrested your dad, is that right?

A. Yes.

Q. But you were in the house; is that correct?

A. Yes.

Q. Did you hear any yelling between your dad and Sylvia Coy that morning?
A. No.
Q. If there had been yelling would you have heard it?
A. Yes I would.
Q. Did you get up early that morning?
A. I got up at five.
Q. Why did you get up so early?
A. I had a golf tournament.
Q. When you have a golf tournament do you always get up that early?
A. Yes.
Q. Was your dad banging on any doors that morning?
A. No.
Q. If he had been banging on any doors would you have heard it?
A. Yes.
Q. That morning on Monday morning did you see your dad at any time hit Sylvia Coy?
A. No.
Q. Did he – did your dad grab Sylvia Coy at any time that you were there?
A. Not that I know of.
Q. Did you ever see your dad push Sylvia Coy that morning?
A. No.
Q. Did you see Sylvia Coy crying when you were in the house?
A. No.
Q. Did you see her?
A. Yes.
Q. Was she acting like she was scared?
A. No.

MR. CARRILLO: Pass the witness.

CROSS-EXAMINATION

BY MS. BECKAGE:

(R.R.Vol. I, P. 75, L. 6 – P. 7, L. 22)
Q. Have you ever seen your dad and Sylvia fight before?
A. No.
Q. Never?
A. No
Q. And did you talk to the police when they came that morning on the 13th?
A. I don't think I was talking to them, but they're like next to me talking to my dad.
Q. And do you recall your dad saying to the police that you weren't around or you didn't see what happened, or you weren't in the vicinity of what happened?
A. I don't remember.
Q. The night before do you remember your mom and dad arguing – I'm sorry, not your mom and dad, your father and Sylvia?
A. No I was with him, we were watching the college world series, Texas.
Q. Okay.
A. And that was until ten.
Q. And what time did you go to bed?
A. Ten
Q. To get up at five you have to.

MS. BECKAGE: I pass the witness.

MR CARRILLO: Nothing further.

THE COURT: May I ask this witness a question any objections from either, State or defense?

MS. BECKAGE: No objection.

MR. CARRILLO: No, Judge.

THE COURT: I'm not sure I heard the last answer I was checking some of my other notes, you were up to when abouts?
A. About 10:00.

THE COURT: And who all was with you, you said you were watching a game?
A. The College World Series.

THE COURT: Who was with you watching that sir?

A. My dad.

THE COURT: And where was the other person in the house?

A. In the bathroom.

(R.R.Vol. I, P. 77, L. 11 – P. 78, L. 14)

THE COURT: Defense attorney is going to tell me in a minute you just heard from the son who was in the house and he testified that he didn't hear any noise that would accompany the kind of testimony we've heard today, banging, yelling, that sort of thing. Why don't you go ahead and deal with that since credibility is obviously an issue.

MS. BECKAGE: Well, I'm not sure exactly. He was there present, all I can say is that you know, not to say that the victim or the witness there would certainly not lying he seems like a good kid, but I'm not sure that he really remembers.

THE COURT: Remind me as I flip through my notes, at what point did the officer's if they did, testify about banging or that kind of stuff?

MS. BECKAGE: I don't know that they did. She told them this but they said that they apparently when they got to the scene, and this would be Officer Warren, that he found her in the bathroom, she motioned him in, he went into the bathroom and she shut the door. There she proceeded to say that she and Mr. Coy had argued, that –

THE COURT: If I argued through a door wouldn't that be louder than normal, don't you think somebody else in the house would hear it if they were there?

MS. BECKAGE: Probably Judge, I guess it depends on how loud we ever arguing, but technically somebody could hear that.

THE COURT: Okay, I'm sorry go ahead.

MS. BECKAGE: At that point Officer Warren again testified that she was afraid of him, that she locked

herself in the bathroom because she was afraid. Did say that in the morning he was banging on the door to try to get her out. Don't know how loud the banging was, banging I guess would imply that it was loud. And again that's what he's testifying that the victim was saying. That in the morning they were yelling, that Mr. Coy was yelling and pushing her around. That she had the phone, and he testified to that she had the phone and that he pulled it from her at the time he grabbed her which left an injury. I guess my thoughts on this are there was an injury, that this individual was according to all the officers, crying, tearful, shaking, her voice was trembling. I'm not sure how you can turn that on and off and why she would call 911, why they would appear and she would have all these states and emotions. And in addition, two officers seeing a visible injury on her arm. True there are no pictures, but both corroborated that they saw the same type of injury, and the victim witness individual said that she saw her hold her arm. Certainly that's not saying that she saw a visible injury, but it can imply that an injury was in that location for some reason she was touching her arm there. I don't know how to explain the fact that the son didn't hear anything, didn't see anything, he was in another room. He was in a room apparently he testified across from where this was occurring, so I don't have any answer given all the other testimony being her state, her emotional state and her injury. I find it hard to believe that she would just kind of create that injury on her own, there was really no explanation for that judge, so given that I would ask that you find the defendant guilty of assault.

Given all the testimony that we have heard. I totally understand that one of our witnesses is an inconsistent, but I still believe there is enough evidence here to show that Sylvia was assaulted by Michael Coy. He grabbed her in the arm and left red marks and bruising. And also confirm that he did pull the phone away from her at the

time that she locked in the bedroom the entire time. I'm not sure for what purpose she was locked in the bedroom other than the fact that she was afraid of him as she testified to the officers. So in a nutshell Your Honor, I ask that you find the defendant guilty of assault family violence.

THE COURT: Thank you, ma'am. Sir?

MR. CARRILLO: Judge, the officers don't really owe any duties to Mr. Coy specifically, but in a general way they do. If they're going to bring a case if they have evidence that is relevant then they should bring it, and what is more relevant than the pictures?

THE COURT: All right. And that's good point that I have been wondering about sometime. Let me ask you this, if you want I'm willing to recess that case until those photographs are produced. And if somebody needs to call a witness to –I mean obviously if they were exculpable evidence I would sanction the State for the failure to produce such. Whether or not the fact they weren't produced and the officer drove down from Pflugerville and the subpoena didn't say go get it out of the computer and he didn't, I don't know. I am willing at this point to recess until those photographs are produced to opposing counsel or I'm willing to go forward?

MR. CARRILLO: Well I'm willing to go forward Judge, I'm willing to go forward. And one reason is this, I don't think that the hone is on us to give them the opportunity to bring evidence. It's their evidence and they have a general duty to prepare the case and bring the pictures.

THE COURT: Okay. I agree wit you, and that's why I'm saying, if you wish to see them, I'm not talking about them being produced to me, I'm willing to stop the proceeding to allow those photographs to be produced to you, they didn't move to introduce them in their case in chief, I will grant you that. And I'm willing to stop and let you see them and if you think you need to do

something different because of the photographs I'm willing to let you do that. I'm not will to let the State reopen, they put whatever case forward they're going to put forward, but I agree with you that you have the right to see those and so I'm willing to stop whatever I'm doing to let you see them, your call.

MR. CARRILLO: No, Your Honor, I think we can go forward just with the point that they failed to bring the most relevant evidence.

THE COURT: They did.

MR. CARRILLO: Because all we got is an alleged hearsay exception, "he hurt me" "I didn't touch her" and you know, if there was anything relevant that those pictures could have resolved the dispute. Also they didn't bring the 911 tape, I mean maybe it wasn't necessary because they alleged it was a verbal dispute, but if a woman calls all excited, all disturbed, all molested, that's another very relevant significant piece of evident. There was no testimony that her hair was messed up, that her clothes were torn, that anything was amidst, any chairs knocked down, tables knocked down, lamps, nothing was amidst according to the officer.

Officer Hawkins' memory is faulty. I said I didn't have any other business there, I didn't have my book there to give him a trespass warning, ticket, and then low and behold we have a ticket that he signed, so his memory is faulty. And remember, he was the one who testified that she was quote very scared, but it's not in his report, that she was quote nervous, but it's not in his report. And he's the one that testified quote, she wanted to know where he was but it's not in his report. So his memory is faulty and it's not in his report so I think they did not prove their case, Judge, I don't think they've met their burden. If you look at Mr. Coy's conduct, on Friday night he called his wife to tell her about Phillip, very reasonable behavior. She on the other hand gets angry hangs up saying I'm not coming, and then she shows up

unannounced, very weird behavior. Then the next day she calls him and she's been crying, so she's been crying and he didn't hit her, didn't assault her or anything and she's been crying.

She shows up the next day everything is supposedly okay, then on Sunday afternoon the weird behavior begins again on her part. They go pick up the child something they've done for at least two years, and she's never complained before, never became a problem when he went to pick up the child and parked next to her ex-wife. But all of a sudden for some reason she's agitated and upset. And even though they have a disagreement nothing happens, he goes home watches the World Series the longhorns, goes to bed. Then the next day since he wife is not cooperating does not want to go back to San Antonio, she doesn't want to do it. And he's tried to arrange with dad which is reasonable behavior, and then he's having trouble with her so he's talking to the officer about something reasonable, give her a trespass warning.

You know, that's not the behavior of someone who flies off the handle, who has a hot temper, who begins swinging at a moments notice, he doesn't do that, he's not the type, then he gets arrested. She on the other hand is emotional, does not act a rationally, and then she makes these allegations and she's not here today to say I've been hurt. I mean she was so scared and got an EPO and it doesn't concern her enough to be here today to supposedly protect herself. I don't think they've been their burden, Judge, I think they should bring the evidence and I don't think they met their burden today.

THE COURT: Anything else from either side?

MS BECKAGE: Judge yeah, I just want to say one thing, I certainly would never make an excuse for the State but we have subpoenaed these photographs and I just wanted everyone to know that the State certainly is not choking out of responsibility, but we have tried to get them, and we will continue to try if defense wants us to.

The other thing is I do have to make a comment about the victim not being here. The only reason sometimes a victim doesn't come it's not just because they don't care about the case, it's clearly because in some cases they're scared for their lives, scared that perhaps when they leave this courtroom the defendants will retaliate. So I just wanted to make that point, thank you.

THE COURT: Anything else from either side?

MR. CARRILLO: Nothing from the defense.

THE COURT: Okay. There's been lot of discussion about the officer's testified there wasn't any knocked over furniture, torn clothes, et cetera, et cetera. As I understand it, correct me if I'm wrong, but I think the only allegation the State is going forward on is the arm grab hard enough to cause bruises or marks. Again, counsel is right there are no photographs I only have the testimony of the two officers and their observations whey they arrived at the scene after at least one of the calls to the Pflugerville Police Department, there was obviously testimony that more than one call was made whether or not either any and all of those statements are true or not true, I don't know because either side has brought me proof of the calls either 411 or the inside line whatever it was as well as the 911 call et cetera.

In any event, the testimony that I have before me, this is a credibility issue and there are several things that strike me as critical to that decision and I certainly understand the argument on both sides. As an example, there's a great deal of testimony by both sides of for example when this criminal trespass warning was given. The officer in question repeatedly was very emphatic, I guess is the word, that that discussion about not wanting her in the house didn't occur according to the officer until after the arrest and the defendant saying okay what's going to happen now and I don't want her in my house.

The defendant has responded that no that occurred right away only sounds like one of the first things said after the officer arrived. The phone, the officer has testified – in

fact I have in my notes with quotes on it strangely enough as the testimony went on, I'd have to flip back to find it, but as I recall I quoted the officer in relaying what the defendant allegedly told him at the scene, how he told the officer or the sergeant I forgot which, that he was able to get the cell phone away from her, yet of course the defendant testified here that he used the house phone to call. And in fact in response to cross examination by the State about how she was able to call 911 he went on to say well she must have had the cell phone, and of course she the officer other than testified he had wrestled that away from her, wrestled is my word not the officer's word, and that's not the exact quote, but essentially he was able to get the cell phone away from her.

It's clear that the testimony between the officer and the defendant are widely diverse on many points those are just tow of the ones I listed here. I agree there are a lot of witnesses that might have helped or pieces of evidence we don't have, but both officers did tell me about the marks they saw on the arm. Both officers describe marks that are in fact in the words of at least one of the officers, consistent with the alleged offense, the finger marks you get from grabbing someone on the arm. The officer to include the victim witness person's testimony all merit one another, not the exact same language of course, but the same observations about the demeanor of the complainant as well as the calls. There are many other things that are difficult to believe that, again it's just one more off the list that I had made to myself as I listened to the testimony or reviewed my notes. The way I've always exchanged my child is this way, yet because the complaint in this case was angry about the way I've done it this time, I moved over several spots in the parking lot even though I see my wife with my son in the car I move over several parking spaces rather than park behind her which is our common procedure and then I just sit there and wait until they hopefully see me. As oppose to I see my wife and son who I'm here to get and then I just sit in the parking lot in the

hopes that someone will glance my way and see me as oppose to drawing their attention so we can do the exchange.

Little things like that coupled with the officer's exact, the light is red the light is green kind of differences and the testimony between what the officer observed and what the defendant testified to, I believe the credible evidence supports the finding of guilt as to the grabbing and I do so find. I will go off the record for a moment to let both parties talk before we proceed to the second phase of this trial. Thank you we're off the record on this matter.

APPENDIX D

CAUSE NO._____

THE STATE OF TEXAS	)	IN THE COUNTY
VS.	)	AT LAW NUMBER 4 OF
MICHAEL COY	)	TRAVIS COUNTY, TEXAS

JURY WAVIER

I am the defendant (accused) in this case. I have talked to my lawyer about my case. In open Court I make the following voluntary statement:

- I am the person charged.
- I am mentally competent and I understand the nature of the charges against me.
- I am aware that any plea bargaining agreement among the State, myself, and my attorney is not binding on the Court.
- I understand that I have a right to have a jury decide whether I am guilty and what my punishment should be, whether I plead guilty, not guilty, or nolo contendere.
- I have the right to be confronted with the witness against me.
- I have the right to remain silent. If I chose to speak, anything I say can be used against me.

Knowing all the above, I give up the following right:

The right of trial by jury.

11-14-05_____ Signed_____
DATE DEFENDANT

11-14-05_____ Signed_____
DATE ATTORNEY FOR DEF

11-14-05_____ Signed_____
DATE ATTORNEY FOR STA

SIGNED THIS _____day of _____, 20___.

Signed_____
JUDGE PRESIDING

APPENDIX E

TEXAS RULES OF APPELLATE PROCEDURE

SECTION TWO: APPEALS FROM TRIAL COURT JUDGEMENT AND ORDERS

RULE 33. PRESERVATION OF APPELLATE COMPLAINTS

33.1 Preservation How Shown.

(a) In General. As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought for the trial court with sufficient specificity to make that trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) Complied with the requirement of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objective, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

APPENDIX F

****Hand Serve-FV** **SUBPOENA**

STATE OF TEXAS VS COUNTY COURT OF LAW # 4

Michael Coy
Defendant

703172
Cause Number

___AFV___6-13-05___
Offense / Date committed

__Pflugerville PO 05-060121__
Agency / Offense Number

Name of Witness	Phone:HM/WK	Address
Sylvia Coy **V	210-723-3164	2834 Woodbury #804 San Antonio, Tx 78217
J. Allen # 95 B. Warren #135 A. Hawkins #59		Pflugerville Police Dept. P.O. Box 679 Pflugerville, Tx 78691

VICTIM/WITNESSES: when you receive this,
call witness coordinator, (512)854-4832
APD officer only call 854-4734

Date stamped: September 12, 2005

TO ABOVE WITNESS

You are commanded by the County Clerk of Travis County, Texas, to appear at the above-stated Court, Travis County, Texas on **OCT. 04, 2005** at 8:30 A.M.
and to remain until discharged. Your failure as ordered could result in the Court's issuing a **WARRANT** for your arrest. Court 4 is located on the 6th floor of the Criminal Justice Center located behind the main Courthouse at 11th and Guadalupe, Austin, Texas.

WHEN YOU ARRIVE IN COURT,
PLEASE CHECK IN WITH A PROSECUTOR

TO ANY PEACE OFFICER OF THE STATE OF TEXAS

Greetings. You are commanded to summon the above-designed witness to be and personally appear before the above-stated county court on the date and at the time specified above and return hereof make according to law.

DANA DE BEAUVOIR, COUNTY CLERK, TRAVIS COUNTY, TX:
Deputy __**Not Signed**____ ___

RETURN OF SERVICE

This order has executed by delivering a copy of the subpoena to the following, or returned not executed by reason:

reason not	Name of Witness	Date and Time served (or served, use back)

_____ Badge #:___ _____

Name of officer delivering subpoena (or returning it unserved),
Sheriff/Constable, Precinct___, County: ___ ___)
Officer making return: _____Badge #_____
Date Subpoena return made:_____

APPENDIX G

CAUSE NO. 703172

THE STATE OF TEXAS IN THE COUNTY COURT

VS. AT LAW NUMBER FOUR

MICHAEL COY TRAVIS COUNTY, TEXAS

STATE'S MOTION FOR CONTINUANCE

TO THE HONORABLE JUDGE OF SAID COURT:

State moves the Court to continue this cause, and in support of the motion shows:

I.

This case is currently set for TBC on 10/4/05.

II.

This motion is not made for the purpose of delay, but in order that justice be done and that State can get victim's presence in court.

WHEREFORE, the state prays the Court grant this motion and continue this cause until the next available date.

10/4/05
Date

Signed
Attorney for State

ORDER

On this day, came to be heard State's Motion for Continuance. After reviewing the evidence and arguments of counsel, the Court finds that good cause exists and that Defendant's motion's should be and is (GRANTED) (DENIED).

IT IS THEREFORE ORDERED that this cause is continued until the _____ day of _____, 1999.

_____ **Not Signed** _____

Date Judge Presiding

APPENDIX H

****Hand Serve-FV** **SUBPOENA**

STATE OF TEXAS VS COUNTY COURT OF LAW # 4

Michael Coy — Defendant
703172 — Cause Number
Bexar County
200 N. Comal
San Antonio, TX

___AFV___6-13-05___ — Offense / Date committed
__Pflugerville PO 05-060121__ — Agency / Offense Number

Name of Witness	Phone:HM/WK	Address
Sylvia Coy - **V	210-723-3164	2834 Woodbury #804 San Antonio, Tx 78217 Bexar County
J. Allen # 95 B. Warren #135 A. Hawkins #59		Pflugerville Police Dept. P.O. Box 679 Pflugerville, Tx 78691

VICTIM/WITNESSES: when you receive this,
call witness coordinator, (512)854-4832
APD officer only call 854-4734

Date stamped: November 1, 2005

TO ABOVE WITNESS

You are commanded by the County Clerk of Travis County, Texas, to appear at the above-stated Court, Travis County, Texas on **NOV, 14, 2005** at 8:30 A.M.
and to remain until discharged. Your failure as ordered could result in the Court's issuing a **WARRANT** for your arrest. Court 4 is located on the 6th floor of the Criminal Justice Center located behind the main Courthouse at 11th and Guadalupe, Austin, Texas.

WHEN YOU ARRIVE IN COURT,
PLEASE CHECK IN WITH A PROSECUTOR

TO ANY PEACE OFFICER OF THE STATE OF TEXAS

Greetings. You are commanded to summon the above-designed witness to be and personally appear before the above-stated county court on the date and at the time specified above and return hereof make according to law.

DANA DE BEAUVOIR, COUNTY CLERK, TRAVIS COUNTY, TX:
Deputy _**Signed Nov. 4, 2005**___

RETURN OF SERVICE

This order has executed by delivering a copy of the subpoena to the following, or returned not executed by reason:

reason not Name of Witness	Date and Time served (or served, use back)

_____ Badge #:_____

Name of officer delivering subpoena (or returning it unserved),
Sheriff/Constable, Precinct___, County: _____)
Officer making return: _____ Badge # _____
Date Subpoena return made:_____

APPENDIX I

(EXCERPTS)

NO. 07-06-00156-CR

In the
Seventh Court of Appeals
Amarillo, Texas

MICHAE COY,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Transferred from the Third Court of Appeals
On appeal from the Travis Court Court-at-law Number Four
Cause No. 703,172

STATE'S BRIEF

DAVID A. ESCAMILLA
TRAVIS COUNTY
ATTORNEY

Giselle Horton
Assistant Travis County
Attorney
Post Office Box 1748
Austin, Texas 78767
Telephone : (512)854-9415
Facsimile: (512)854-9316

June 28, 2006

ATTORNEYS FOR THE
STATE OF TEXAS

ORAL ARGUMENT IS NOT REQUESTED

ISSUES PRESENTED AND SUMMARY OF THE ARGUMENS

Issue One: Mrs. Coy, the complainant, did not appear for trial in response to the Stat's subpoena. The trial court admitted her out-of-court statements to police, which related her account of what happened. Did admitting these out-of-court statements violate Coy's rights under the Confrontation Clause?

Argument One Summary: Coy's confrontation argument on appeal is not preserved he objected to this evidence only on hearsay grounds.

Issue Two: May a court of appeals hold that, after the Supreme Court's decision in Crawford v. Washington, a criminal defense lawyer's failure to object to out-of-court statements on confrontation grounds is ineffective assistance as a matter of law?

Argument Two Summary: An appellate court may not so hold. Appellants carry the burden of showing ineffective assistance of counsel. When the record is silent as to defense counsel's reasons for the omission, as the record is here, the law requires that Court to presume that counsel's actions were motivated by a valid strategy, if any can be imagined. Because the record amply supports a strategic motivation, this Court should presume that counsel's representation fell within the wide range of reasonable and professional assistance.

Issue Three: Without the complainant's hearsay statements, is the evidence factually insufficient to sustain the judgment of conviction, as Coy contends?

Argument Three Summary: Factual-sufficiency review requires appellate court to consider all of the evidence

presented, whether properly or improperly admitted. Under Texas law, an appellant presents nothing for review if his evidentiary-sufficiency claim asks a court to view less than all of the evidence.

Reply Point Two: Coy has not shown that he was denied effective assistance of counsel:

Coy asks this Court to find his trial attorney ineffective as a matter of law for failig to object to Mrs. Coy's statements on confrontation grounds. He is asking too much. Because Coy failed to made a record affirmatively proving that his trial counsel's performance was deficient, this Court must presume that the failure to object on confrontation grounds was sound trial strategy. Thompson v. State, 9 S.W.3d 808, 813-14 (Tex.Crim.App. 1999).

Coy has the burden of proving ineffective assistance of counsel. Moore v. State, 694 S.W.2d 528, 531 (Tex.Crim.App. 1985). His allegation must be firmly founded and affirmatively shown in the record. Thompson 9 S.W.3d at 813. The record on direct appeal, alone, is generally not sufficient to meet the Strickland standard, as the reasonableness of counsel's choices often involve facts that will not appear in the appellate record. Rylander v. State, 101 S.W.3d 107, 110 (Tex.Crim.App. 2003). When a claim of ineffective assistance of counsel is based on an omission rather than a commission, the evidence is usually outside the record and must be fully developed. Ex Parte Duffy, 607 S.W.2d 507, 513 (Tex.Crim.App. 1980), overruled on other grounds, Hernandez v. State, 988 S.W.2d 770 (Tex.Crim.App. 1999).

At the new-trial hearing, Judge Denton gave both attorneys the opportunity to "put anything on the record [they] need to for purposes of an appeal." RRMNT 5. Despite this offer, and the full opportunity to advance a new claim and prove it up, Coy's appellate counsel failed to

develop any kind of record; she neither alleged ineffective assistance in her motion for new trial, not presented evidence supporting an ineffectiveness claim. See Ex Parte Torres, 943 S.W.2d 469, 475 (Tex.Crim.App. 1997) (ineffective assistance of counsel may be shown in the record at a new-trial hearing); also Gutierrez v. State, 8 S.W.3d 739, 749 (Tex.Crim.App.-Austin 1999, no pet.) (same). Indeed, the defense also could have but failed to plead and prove the ineffective claim at the hearing on the application for a writ of habeas corpus.

Without any evidence of counsel's reasons for the challenged conduct, an appellate court will assume a strategic motivation if any can possibly be imagined. Garcia v. State, 57 S.W.3d 436, 440 (Tex.Crim.App. 2001); Bohnet v. State, 938 S.W.2d 532, 536 (Tex.App.-Austin 1997, pet. Ref'd) (refusing to find counsel's performance was deficient when the appellant did not present any evidence showing reasons for counsel's action); Autry v. State, 27 S.W.3d 177, 182 (Tex.App.-San Antonio 2000, pet. Ref'd).

Coy's appellate counsel asserts that no competent attorney would have failed to lodge a Crawford objection.

> [T]here have been dozens of Texas continuing legal education criminal law seminars at which Crawford was a major topic. Consequently, [there] can be no valid reason for any attorney not to have known and understood Crawford by the time of this trial.

Coy's Brief, pp.14-15. Looking at the totality of the representation, however, a strategic motivation for failing to object to the hearsay statements under Crawford v. Washington can indeed be imagined. Counsel reasonably could have believed that the complainant's statements were non-testimonial and therefore admissible on confrontation grounds. See Thompson, 9 S.W.3d at 814 (in which defense counsel might have failed to object because he could reasonably have believed that the testimony was admissible and an objection therefore inappropriate).

Additionally, the record shows that the defense concentrated its efforts on discrediting the State's witnesses by cross-examining them, and by presenting a very different account of events through the testimony of Coy and his son during the defense case-in-chief. Under the defense's "hell hath no fury" theory on the case, Mrs. Coy was an emotionally needy and unstable woman who, spoiling for a fight and getting none, packed up her dog and her clothes and left, then returned the next day, only to spend the night in the bathroom. RR 53-61. According to the defense attorney testimony, Coy never assaulted his wife, and she probably self-inflicted the red marks on her arm. The marital relationship was all but over; he simply wanted her out of the house. RR 61, 64. In fact, while he was on the telephone discussing having her removed from the house and getting the police to issue her a criminal trespass warning, Mrs. Coy was calm, dry-eyed, and calling the police on him. RR 61-63. This was an effective theory, if believed.

The other prong of the defense strategy consisted of calling into question the officers' integrity and credibility: the police officers' testimony could not be trusted. They testified to details that were not included in their offense reports. They failed to back up their claims of observed injury by bringing their photographs to court. RR 17-18; 32-39. In fact, one of the officers outright lied when he denied talking to Coy about offering to issue his wife a criminal-trespass warning. RR 66. This strategy was carried through into closing argument. Judge Denton acknowledged it when he gave a detailed explanation of the credibility choices posed by the disparate versions of events in the two cases-in-chief. RR 85-88. Choosing to call witness integrity and credibility into question is an effective tactical choice. See Villatoro v. State, 897 S.W.2d 943, 946 (Tex.App.-Austin 1994, prt. Ref'd) (holding that the decision to explain rather then highlight inadmissible evidence through objection may be sound trial strategy).